Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75 - 1413

WAYNE A. STANTON, et al.,

Petitioners,

- V -

LOUISE BOND, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the U.S. Court of Appeals for the Seventh Circuit has been reported at 528 F.2d 688 (7th Cir. 1976), and appears in the Appendix of the Petition at pages A-1 -- A-7. The opinion of the District Court is unreported and appears in the Appendix of the Petition at pages A-8 -- A-10.

Jurisdiction

See Petition.

Question Presented

See Petition.

Constitutional Provision Involved

See Petition.

Statement of the Case

In addition to what is set forth in the Petition at pages 3 - 5, respondents would add that the basis for the award of attorney fees in this case was the bad faith of the State officials "which necessitated the present injunctive suit," 528 F.2d at 690.

Argument

The considerations governing review on certiorari are set forth in Rule 19 of the Rules of the Supreme Court. Section 19(1)(b) controls this case and, although not explicitly stated in the Petition, the only apparent basis for granting the writ is that the Seventh Circuit "has rendered a decision in conflict with the decision of another court of appeals on the same matter."

Although it is arguable that there is a conflict in the circuits, a close examination of the decisions indicates that the only conflict may be within a circuit, i.e. the Sixth.

Relying on this Court's holding in Hicks v. Miranda, 422 U.S. 332, 344-45 (1975), the Seventh Circuit affirmed the award of attorney fees on the ground

> that the Supreme Court's summary affirmance of the district court's award of attorneys' fees against state officials in their official capacity [in Sims v. Amos, 409 U.S. 492 (1972)] was a decision on the merits of the immunity issue presented to us in this case.

528 F.2d at 691. The court further indicated that it did "not find in Edelman v. Jordan evidence of an intention to overrule Sims or of a doctrinal development indicating that Sims would be decided differently today." Id.

This ruling by the Seventh Circuit that the eleventh amendment does not bar an award of attorney fees against state officials brings it into conformity with at least four other circuits. They are the First Circuit in Sousa v. Travisono, 512 F.2d 1137 (1st Cir.), vac. and remanded for further consideration in light of Alyeska (presumably because of reliance on the private attorney general theory), 96 S.Ct. 19 (1975);[1] the Second Circuit in Jordan v. Fusari, 496 F.2d 646 (2nd Cir. 1974), Class v. Norton, 505 F.2d 123 (2nd Cir. 1974), and Fitzpatrick v. Bitzer, 519 F.2d 559 (2nd Cir.), cert. granted 96 S.Ct. 561 (1975) (argued April 21, 1976); the Fourth Circuit in Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975); and the Ninth Circuit in Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).

Three other circuits which have discussed the issue are less clear, although none of them can definitely be said to be in direct conflict with the Seventh plus the four listed above. Currently the Fifth Circuit can best be characterized as having no position on the issue. Although it has considered the issue, most recently in two en banc rulings, Newman v. State of Alabama,

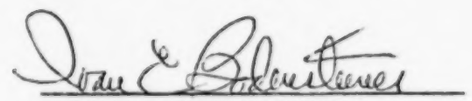
[1] Since the affirmance by the Seventh Circuit was based on the defendants' bad faith rather than the private attorney general theory, clearly there is no Alyeska problem in this case. 528 F.2d at 689-90.

522 F.2d 71 (5th Cir. 1975) and Gates v. Collier, 522 F.2d 81 (5th Cir. 1975), it remanded the question to the district courts.[2] While the Third Circuit has arguably held that the eleventh amendment bars an award of attorney fees in the case of Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3rd Cir. 1974), vac. and remanded, 95 S.Ct. 1986 (1975), it is apparent that Skehan did not specifically rule on the eleventh amendment issue. This was made clear in the case of Downs v. Dept. of Public Welfare, 65 F.R.D. 557, 560 (E.D. Pa. 1974), a decision of a district court within the Third Circuit holding that Skehan was not controlling on the eleventh amendment issue. Therefore, the only possible source of a conflict in the circuits is the Sixth Circuit. However, as noted by the court below, it is quite apparent that the Sixth Circuit does not have a definite position on the issue and it depends on the panel of judges.

> In the Sixth Circuit, two panels have not followed Sims. Jordon v. Gilligan, 500 F.2d 701, 710 (6th Cir. 1974), cert. denied, 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481 (1975); Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), vacated for further consideration in light of Alyeska (presumably as to the part of the opinion upholding an award against a defendant individually on a private attorney general theory), 421 U.S. 982, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In an intervening decision, Milburn v. Huecker, 500 F.2d 1279 (6th Cir. 1974), another panel permitted an award of attorneys' fees in an opinion which denies retroactive welfare benefits on the ground of Edelman's interpretation of the eleventh amendment, but, in discussing attorneys' fees, makes no reference to Edelman, or the amendment although citing Sims. Milburn was cited in Taylor only for another point. 503 F.2d at 904. Judge Edwards dissented in Taylor, arguing, inter alia, that Sims was binding. 503 F.2d 906, 907-908.

528 F.2d at 690 n.2.

In conclusion, it is respondents' position that there is not a conflict in the circuits on the issue of whether or not the eleventh amendment bars an award of attorney fees against state officials. Since petitioners have advanced no other basis for granting certiorari in this case, the Petition must be denied.



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[2] On remand, the district court in Gates v. Collier, 44 U.S.L.W. 2405 (N.D. Miss., Feb. 3, 1976), ruled that the eleventh amendment does not bar an award of attorney fees.